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Supreme Court of the United States

OCTOBER TERM, 1934

No. 11

GEORGE W. McCANDLESS, as Receiver of Duquesne Gas Corporation,

Petitioner,

against

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER GEORGE W. McCANDLESS AS RECEIVER OF DUQUESNE GAS CORPORATION

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER GEORGE W. McCANDLESS AS RECEIVER OF DUQUESNE GAS CORPORATION

This case comes before the Court on a writ of certiorari granted to the United States Circuit Court of Appeals, Second Circuit, issued April 30, 1934 (78 L. Ed. 863) (not officially reported).

The judgments and decrees below are the judgment of the United States Circuit Court of Appeals, Second Circuit, filed January 15, 1934 (R. 74), reversing the decree of the United States District Court for the Southern District of New York, dated the 11th day of May, 1933, which awarded a judgment to the complainant

McCandless as receiver in the sum of $1,834,640.08 (R. 67).

OPINIONS BELOW

The opinion of the District Court is printed at pages 52-66 of the Record and is reported in 4 Fed. Supp. 884 (advance sheets only). The opinion of the Circuit Court of Appeals is printed at pages 68-73 of the Record and is reported at 68 Fed. (2nd) 925.

JURISDICTION

The jurisdiction arises from the granting of the writ of certiorari herein pursuant to Section 240(a) of the Judicial Code as amended by the Act of 1925.

STATEMENT

This is a suit brought by the petitioner in his capacity of ancillary receiver of Duquesne Gas Corporation, appointed as such in the District Court of the United States for the Southern District of New York (R. 3-12). After a trial before United States District Court Judge Knox, a decree was made awarding judgment to the complainant against the defendants Maxime H. Furlaud and the Kingston Corporation in the sum of $1,834,640.08 and dismissing the complaint as to the defendants Byron Corporation and Chaucer Corporation (R. 67-8). The defendant Carlos Reuter was not served with process and did not appear (R. 1).

The defendants Maxime H. Furlaud and Kingston Corporation appealed from such decree to the Circuit Court of Appeals, Second Circuit, and the complainant

took a cross appeal claiming that judgment should have been awarded against each of the defendants Byron Corporation and Chaucer Corporation, and also that the judgment against the defendants Maxime H. Furlaud and Kingston Corporation should be increased.

Upon the appeal the defendants raised the question of the validity of the appointment of the complainant as ancillary receiver. They claimed that the appointment of the complainant as ancillary receiver in the District Court for the Southern District of New York was void and that such appointment could be collaterally attacked and that the judgment which had been granted in favor of the complainant as such ancillary receiver should, therefore, be reversed. The Circuit Court of Appeals adopted this view and reversed the judgment of the District Court but expressly refrained from deciding the merits.

Since the decision of this Court granting the writ of certiorari limited it to the questions pertaining to the right of the complainant to maintain the suit, we will refrain from detailing the facts. Suffice it to say that suit was brought by the ancillary receiver in behalf of the corporation and of its creditors against the defendants as fraudulent bankers and promoters of the corporation for an accounting, in that, while acting in a fiduciary capacity to the corporation, they misappropriated a large part of the proceeds of the public issue and sale by them of the bonds and notes of the corporation. A further statement of the nature of the suit appears sufficiently, we believe, for present purposes in the opinion of Judge Knox (R. 52-66).

The Circuit Court of Appeals based its reversal of the judgment wholly upon the proposition that the appointment of the petitioner as ancillary receiver was void

and could be collaterally attacked. The sole reason for this determination was that such appointment was made upon the application of the petitioner herein as the primary receiver, acting under his appointment as such in the United States District Court for the Western District of Pennsylvania, rather than upon a separate ancillary bill by a creditor of the corporation against the corporation in the United States District Court for the Southern District of New York.

The complainant McCandless was duly appointed as primary or domiciliary receiver of Duquesne Gas Corporation in the District Court of the Western District of Pennsylvania in which the Duquesne Gas Corporation was domiciled and within the confines of which all of its tangible property was situated. Such receivership was granted in two suits: one a suit by a stockholder, and the other by the trustee under the mortgage securing the bonds. These suits were consolidated *and the corporation then appeared and consented to a decree for the appointment of a receiver.* The complainant was thereupon appointed such receiver and duly qualified and has ever since been acting as such. The decree in the primary proceedings was in the usual form, sequestering all of the assets of the corporation (R. 17-52). The validity or propriety of the primary receivership proceedings has not been questioned.

As the defendants who had to be sued were to be found only in New York, it was necessary under the doctrine established by the decision of this Court in the case of *Booth* v. *Clark,* 17 How. 322, 58 U. S. 322, 15 L. Ed. 164 (1855) that an ancillary receiver be appointed in the Southern District of New York in order there to maintain the suit. Therefore, the petitioner filed his petition in the Southern District of New York, setting forth his

appointment as primary receiver and attaching thereto exemplified copies of the proceedings in the United States District Court of the Western District of Pennsylvania relating to his appointment as primary receiver and asking for the appointment of an ancillary receiver. The petition alleged the existence of a cause of action against the New York defendants (R. 17-19).

The order of the District Court of the Southern District of New York appointing the petitioner ancillary receiver, dated March 23, 1932, is printed at pages 50-51 of the Record, and recites that it is made,

> "Upon the annexed bill of complaint filed in the above entitled suit in the United States District Court for the Western District of Pennsylvania, and upon the answer of the defendant therein to said amended bill of complaint, *and upon the per curiam decree therein of the United States District Court for the Western District of Pennsylvania, dated the 19th day of January, 1932, appointing George W. McCandless receiver of the assets,* lands, tenements and hereditaments of the defendant Duquesne Gas Corporation, and all of its property real and personal, *including choses in action,* * * *"

This order authorized the beginning of the instant suit, provided for a bond of $25,000 and further "that upon any moneys or funds coming into his hands said ancillary receiver shall immediately report the fact to the Court and submit to the Court the question of an increase of this bond" (R. 51-52).

The record does not disclose the existence of any tangible property of Duquesne Gas Corporation within the Southern District of New York, nor is the existence of any such property known. The case was submitted for

decision in the Circuit Court of Appeals upon the statement made by counsel that there was no tangible property in the Southern District of New York.

SPECIFICATION OF ERROR

The Circuit Court of Appeals erred in reversing the decree of the District Court dated the 11th day of May, 1933 and in holding that the appointment of the petitioner as ancillary receiver was void and could be collaterally attacked.

ARGUMENT

POINT I

THE APPOINTMENT OF THE PETITIONER AS ANCILLARY RECEIVER IS VALID AND HE HAS THE RIGHT AS SUCH TO MAINTAIN THE SUIT. THE APPOINTMENT CANNOT BE COLLATERALLY ATTACKED.

The opinion of the Court below contains the following statement of its reason for declaring petitioner's appointment as ancillary receiver void:

> "Thus, upon the petition alone of a foreign federal receiver, an ancillary receiver is appointed, where no bill had been filed in the jurisdiction by any party aggrieved praying for such relief. No process was issued in this jurisdiction and there has been no appearance or answer filed by the corporation within the district (R. 72). * * *
>
> "Ancillary proceedings are independent suits and there must be a plaintiff and a defendant and the first must be one who claims injury committed

> by the defendant. * * * The appointment of the plaintiff as ancillary receiver was void, and he did not acquire, in any of the proceedings, a status to warrant the institution of this suit" (R. 73).

A conclusion opposite to that reached by the Court below has been arrived at by the Circuit Court of Appeals in the other Circuits in which the question has come up for decision, viz. the Third, Fourth, Eighth and Ninth Circuits. See *Mitchell* v. *Maurer,* 69 Fed. (2d) 233 (C. C. A. 9th, 1934); *Ward* v. *Foulkrod,* 264 Fed. 627 (C. C. A. 3rd, 1920); *Coal & Iron Ry. Co.* v. *Reherd,* 204 Fed. 859, 882 (C. C. A. 4th, 1913); *Rust* v. *United Water Works Co.,* 70 Fed. 129 (C. C. A. 8th, 1895).

In the *Mitchell* case, a California state receiver, who had been appointed such on the same day as the appointment of ancillary receivers in a Federal District Court of California, made a direct challenge of the validity of the order appointing the ancillary receivers. The appointment challenged was made upon a petition of the primary receivers who had been appointed equity receivers in a suit in Delaware. The validity of the appointment of the ancillary receivers was sustained. At pages 235 and 236, the Circuit Court of Appeals reviews the cases of *Booth* v. *Clark,* and the other decisions following it, including this Court's decisions in *Great Western Mining & Mfg. Co.* v. *Harris,* 198 U. S. 561, 25 S. Ct. 770, 49 L. Ed. 380, and *Sterrett* v. *Second National Bank,* 248 U. S. 73, 39 S. Ct. 27, 63 L. Ed. 135. After emphasizing that the reason for the rule of *Booth* v. *Clark* is the protection of local creditors, the Circuit Court of Appeals then quotes from this Court's opinion in the *Sterrett* case referring to the practice under the rule of *Booth* v. *Clark,* where this Court says:

> "It (such practice) permits an application for an ancillary receivership in a foreign jurisdiction where the local assets may be recovered and, if necessary, administered."

The opinion of the Circuit Court of Appeals then goes on and says:

> "Indeed, specific recognition of the right of the primary receiver to ask for the appointment of an ancillary receiver in a foreign jurisdiction is contained in the case of *Ward* v. *Foulkrod* * * *."

The Court also refers to *Rust* v. *United Waterworks Co.* as authority for such procedure and then states at page 237:

> "Assuredly such a petition does not come within the strictures of the Supreme Court in the *Great Western* case, *supra,* as to the disregard of 'rights of local creditors'."

In the *Ward* case the Court commented upon the federal rule that an equity receiver may not sue beyond the jurisdiction of the Court appointing him. The Court propounded the question "What then is to be done?" and then proceeded to point out that the filing of a petition by the primary receiver for the appointment of an ancillary receiver was the proper procedure and said:

> "When the prayer of such a petition has been granted and ancillary receivers have been appointed, all rights, those of the domiciliary court and of the foreign court, and of all stockholders and creditors of the corporation in both jurisdictions, will fall into their proper places and will be duly cared for and protected in the orderly administration of the estate" (p. 637).

In the *Coal & Iron Ry. Co.* case, the Circuit Court of Appeals of the 4th Circuit held that the appointment of an ancillary receiver upon the petition of a primary receiver is a proper practice. After citing *Booth* v. *Clark, Great Western Mining & Mfg. Co.* v. *Harris* and several of the other similar decisions of this court the court said at page 882:

> "It seems to be settled, therefore, that this receiver, who was appointed in a Virginia court, was not authorized in the outset to institute his action in the United States Court in the Northern District of West Virginia; but the plaintiff undoubtedly, from his subsequent action, undertook to cure this defect by going into Randolph County, W. Va., after the suit had been begun, and filing an ancillary bill, under which an order ratifying his appointment as receiver was made, * * *.
>
> "The question then presented is as to whether this proceeding, taken after the suit had been actually instituted, would have the effect for which it was intended. It occurs to us that in this situation the position of the defendant becomes one of extreme technicality. *Undoubtedly, if the plaintiff had filed his ancillary bill in the state court of Randolph County, W. Va., and his appointment as receiver had been ratified, and authority given to bring the suit, the proceeding herein would have been regular and the question of jurisdiction eliminated.*
>
> * * *
>
> "Under the circumstances of this case, after all the facts have been fully considered by a court and a jury, consuming no doubt much time and a large expenditure of money, we are not inclined, and it would in our opinion be unwarranted, to respond to the defendant's position, which involves, as we have said, a mere technicality based

> upon an irregular proceeding, and such action on our part would not only greatly militate against the interests of the parties to this action, but would also tend to unnecessarily retard the administration of justice." (Italics supplied.)

In the *Rust* case, it was held that it is proper for a Federal Court, in which a suit is pending, to permit a foreign equity receiver to appear therein and file a petition to be appointed ancillary receiver in order to protect the rights of the receivership estate in such suit, and for the Court upon such petition to appoint him as such ancillary receiver and to permit him as such to come in and defend.

The Court said at page 133:

> "The question before the court below was not whether or not, without its order or permission, the plaintiff in error had the power or the authority to defend the action against the American Waterworks Company, but whether or not, upon the facts disclosed by his petition and the answer to it, that court ought to give him permission and authority so to do. *It goes without saying that the court below had the power, upon the presentation to it of the decree of the court of chancery of the state of New Jersey appointing the plaintiff in error the receiver of the property of this insolvent corporation, and the trustee for its creditors and stockholders, to appoint him a receiver and trustee, with the same powers, in the district of Colorado, and to authorize him to sue for, and to defend suits against, the waterworks company in that district in the name of the corporation, or in his own name.*" (Italics supplied.)

In the case of *Shinney* v. *North American Savings L. & B. Co.*, 97 Fed. 9 (Circuit Court District of Utah,

1899), a Chancery receiver appointed by a State Court in another state was upon his own petition appointed ancillary receiver in the United States Court for the Utah District. This was done upon the authority of the *Rust* case.

In the case of *Seested* v. *Bonfils,* D. C. Colo., 1929, 33 Fed. (2d) 185, a foreign equity receiver of a foreign corporation brought a bill asking to be appointed ancillary receiver of the corporation and as such be permitted to maintain the suit. The practice adopted was to seek the appointment as ancillary receiver as a step in and a part of the suit which was for the recovery of corporate funds fraudulently diverted. The Court approved this procedure relying on the *Rust, Ward* and *Shinney* cases.

Who has any direct interest in the propriety of an order appointing an ancillary receiver? The answer is obvious: (1) the defendant corporation, (2) the local creditors within the ancillary jurisdiction, and (3) in an important, though different sense, the primary receiver.

As to the corporation: it was held in the case of *Bluefields S. S. Co.* v. *Steele,* 184 Fed. 584, C. C. A. 3rd Cir. (1911) that, where the procedure adopted is the filing by a creditor of a separate bill for the appointment of an ancillary receiver in a jurisdiction foreign to the primary appointment, no *subpoena ad respondendum* is necessary,—that the new bill is to be deemed ancillary to the original bill in every sense,—that the parties having been brought before the primary court are to be deemed to be before the ancillary court for that purpose. The Court said at page 587:

> "In any such case the jurisdiction is analogous to that of a court to appoint a receiver on a proper bill in a suit ancillary to another suit or action pending in the same court. In a suit strictly

> ancillary to another suit pending in the same court, no *subpoena ad respondendum* is necessary. The parties are already in court. The service of a rule or of notice is all that is required to enable the court to proceed with the ancillary suit. So, where a defendant has been regularly brought into court in an original suit, and a receiver of his property has been appointed in that suit, another court, whose jurisdiction is invoked in aid of the original receivership, may proceed on the service of a rule or notice merely."

It was held in the case of *Walker* v. *United States Lighting & Heating Company,* 220 Fed. 393, D. C. S. D., N. Y. (1915) that, in a case where the proceeding for the ancillary appointment was taken by an ancillary bill, the corporation (the defendant in receivership) could not go behind the consent that it had given to the making of the primary receivership and be heard to resist the appointment of the ancillary receiver. In a word, that there is nothing to litigate in such an ancillary suit.

The corporation (the defendant in the primary suit whose assets have been taken out of its control and sequestered in the hands of the Court) is the party chiefly concerned. But as shown by the *Bluefields* case, it, by virtue of its being a party before the Court in the primary proceedings, is deemed to be before the Court in the ancillary proceedings and, as shown by the decision in the *Walker* case, having consented in the primary proceeding, it is powerless to do anything but acquiesce in the ancillary proceeding.

As to the local creditors, manifestly their interests are equally well protected however the appointment of the ancillary receiver comes about so long as such ancillary receiver is amenable to the further orders and directions of the Court appointing him and is under bond.

An ancillary receiver appointed as was the receiver in the instant case is fully accountable in every sense to local creditors, as much so as would be an ancillary receiver appointed upon a separate bill.

As to the third party who has an interest in the proceedings, viz., the primary receiver, the procedure of having it made upon his petition recognizes that interest. On the other hand, where a separate bill of a creditor against the corporation is the form of procedure adopted, it fails to take the interest of the primary receiver into consideration. While it is true that the primary receiver has no direct interest of his own, such as the interest of the corporation or of its creditors, nevertheless he is the officer of the Court having the primary jurisdiction of the subject matter to whom the assets of the corporation have been committed and is charged with the duty of administering them. It is a well established rule of procedure that the ancillary jurisdictions look to the primary jurisdiction for the orders and decrees leading to the final fixing of the rights of the interested parties and for sale, distribution, etc. The ancillary courts conform so far as they can, consistently with the protection of local creditors, with the dispensations and determinations made by the Court of primary jurisdiction. This being so, it goes without saying that he who is acting as the chief officer of the Court primarily concerned, viz., the primary receiver, is one who properly should be before the Court in any proceeding for the appointment of an ancillary receiver.

Having regard to the realities, the primary receiver is, indeed, the only person who needs to be heard upon such an application in the ordinary conservation consent receivership such as this. In truth, the procedure in the form of another independent suit with

a creditor as complainant and the corporation as defendant disregards the one whom the Court is chiefly interested in hearing,—the primary receiver. Of course no Court in the normal situation would see fit to go forward with the appointment of an ancillary receiver without being well assured that the step had the cognizance of the primary receiver and the Courts usually appoint the primary receiver as ancillary receiver, as was done in the instant case. This goes to show that the proceeding by way of petition by the primary receiver is more in accord with the realities than the procedure by way of another creditor's bill.

What conception of the proper exercise of judicial power or of jurisdiction to act is then violated by the appointment of an ancillary receiver upon the petition of the primary one? What purpose would be served, excepting a slavish adherence to a meaningless legal formula, in requiring a creditor to file a new bill against the corporation in the ancillary jurisdiction? Even if judicial process against the corporation for such purpose were required to be served upon the corporation anew,—which under the decision of the *Bluefields* case, it is not,—the Court of the primary jurisdiction, which has the corporation before it could no doubt, if it saw fit, direct it to appear in that suit for the purpose of thus conforming to an idle formula, or even to direct it not only to appear but to formally consent to the appointment of the ancillary receiver if that consent anew were required, —which the decision in the *Walker* case shows that it is not.

Where an awkward form of judicial procedure thus appears to have nothing of substance in it and to consist merely of a hollow formula, there is no underlying judicial conception of power or of jurisdiction which requires

it to be followed. This being so, the simple straightforward procedure of petition by the primary receiver is to be preferred.

The Circuit Court of Appeals cites several cases as authority for its holding that the appointment of an ancillary receiver cannot be made by way of petition by the primary receiver. The only one of these cases which clearly appears to deal with a situation arising from the appointment of an ancillary receiver upon the petition of a primary receiver is that of *Greene* v. *Star Cash & Package Car Co.*, 99 Fed. 656. But it is plain that the Court based its decision vacating the appointment which it had just made of an ancillary receiver on the ground that it had been made to appear that the interests of the corporation had not been properly protected in the primary receivership proceedings.

Although in the case of *In re Brant*, 96 Fed. 257, the Court seemed to condemn the appointment of an ancillary receiver upon an *ex parte* petition, it does not appear from the report how the appointment was made; it does not appear that the petition was presented by the primary receiver; nor does it appear whether the original receivership was with the consent of the debtor.

The case of *Fairview, etc. Co.* v. *Ulrich*, 192 Fed. 894 (C. C. A. 7th, 1911), cites with approval the *Brant* case. But it is clear that the *ex parte* application for the appointment of an ancillary receiver was not made by the primary receiver but merely by a creditor, and the record fails to disclose that the primary receivership was brought about upon the corporation's consent.

The authorities relied on by the Circuit Court of Appeals and by the respondents are at most some authority for the proposition that the bringing about of the appointment of an ancillary receiver upon the *ex parte*

application of *a creditor* in cases *where the corporation has not consented to the primary receivership* is irregular. Even if they can be construed as meaning more than this,—which we believe is not the case,—they are then clearly out of line with the weight of authority upon the question here involved.

The case of *Mercantile Trust Co.* v. *Kanawha & O. Ry. Co.*, 39 Fed. 337, which seems to have been the basis for whatever doubt has since been entertained as to the propriety of the appointment of an ancillary receiver upon the petition of a primary receiver, is not authority for such a holding, although this case was cited by the Circuit Court of Appeals, as well as by the Courts in the other cases referred to by the Circuit Court of Appeals. In the *Kanawha* case, the complainant (trustee under the mortgage) in a railway foreclosure case, in which the property of the railway was in more than one state, and who had brought about the appointment of a receiver in a Federal Court in Ohio, then made an *ex parte* application in a Federal Court in West Virginia merely asking that that Court decree that the West Virginia property be held amenable to the orders thereafter to be made by the Ohio Court, and the Court refused such relief.

In the case of *Platt* v. *Philadelphia & R. R. Co., et al.*, 54 Fed. 569 (1893), Circuit Judge Putnam referred to the *Kanawha* case and refused to follow it as authority for the proposition that it was improper to bring about the appointment of an ancillary receiver upon the petition of the primary one. The Court said:

> " * * * in other districts such bills have been frequently entertained and acted upon, generally, if not always, on *ex parte* proceedings, and without argument. The same has been done *ex parte*

on several occasions in this court. We will at present follow this practice * * *."

This leads to a practical consideration of serious import. As we have seen from the cases cited at the beginning of this point there is very considerable authority in several of the circuits countenancing and approving the appointment of an ancillary receiver upon the petition of a primary receiver. On the other hand, there is no authority other than the decision of the Circuit Court of Appeals now under review which directly condemns the procedure.

We should point out at this place that *Clark on Receivers,* Second Ed., 1929, which is one of the most thorough texts, at Section 318, pages 434-5, refers to several of the cases cited above and suggests that the appointment of an ancillary receiver upon the petition of the primary receiver is proper. It is also to be noted that the only form contained in the compilation of forms attached in this book and relating to the appointment of ancillary receivers is a form of petition by the primary receiver.

It cannot, therefore, be doubted that this form of procedure has been embraced time and time again and that many of the appointments of ancillary receivers, throughout the United States have been made upon petitions presented by the primary receiver, as was done in the instant case.

If, therefore, the decision of the Circuit Court of Appeals be affirmed by this Court, it would mean that all such appointments are void and subject to collateral attack, and that all suits which have heretofore been maintained by ancillary receivers thus appointed are subject to be reopened and raked over, and that all titles to properties acquired through ancillary receivers thus

appointed are subject to attack. It cannot be doubted that the rights of many, in subject matters of large importance, would thus be disturbed or destroyed. Such a result should be avoided and can be without injury to precedent or principle.

There is still a further practical consideration of grave importance which is raised by the opinion of the Circuit Court of Appeals. That opinion states (R. 73):

> *"Even if there are assets in the foreign jurisdiction,* the Court there has a right to appoint a receiver only in a pending suit where independent relief is asked." (Italics supplied.)

During the course of the argument, one of the Judges of the Circuit Court of Appeals stated that, there being no tangible assets within the Southern District of New York, he did not see how the appointment of an ancillary receiver could be brought about by any form of procedure. This, certainly, is the result suggested by the language of the opinion just quoted. If this is the correct view, it would have to follow that a receiver situated as is the petitioner would have no possibility of beginning or prosecuting a suit to hold these fraudulent promoters accountable, unless by chance, he could find them within the jurisdiction of the Western District of Pennsylvania; that the Courts in such a situation would be entirely helpless by any form of procedure to bring about the appointment of an ancillary receiver in order to make possible the prosecution of suits which were necessary for the proper protection of the receivership estate and of the interests of the creditors.

The opinion of the Circuit Court of Appeals refers to *Booth* v. *Clark,* and several other decisions following it and then states (R. 73):

> "To permit a foreign receiver to obtain an ancillary appointment, on an *ex parte* application improperly avoids the rule denying foreign receivers the right to sue in the foreign jurisdiction."

But the procedure here adopted for the appointment of the ancillary receiver does not, as the Circuit Court of Appeals says, avoid the rule. On the contrary, the procedure was adopted in recognition of the rule and in full compliance with it. It was for this that the receiver applied for and obtained his ancillary appointment and furnished bond for the protection of local creditors.

The question finally reduces itself to what this Court should require to be done by way of compliance with its rule of *Booth* v. *Clark,* and the correct decision of this will, we believe, be affected by a consideration of the nature of and the reasons for the rule as disclosed by that decision as well as by the history of its further development.

What is the rule of *Booth* v. *Clark,* which the Court below says was improperly avoided? It is a rule for the Federal Courts announced in 1855 in that case that the principle of comity should not be applied so as to permit a foreign receiver to sue. This Court, after discussing the decisions of the English Courts and the situation in respect of the other European nations and finding that, generally, foreign receivers are permitted to sue as a matter of international comity, said at page 336:

> "It may now be said to be the rule of comity between the nations of Europe; but it has never been sanctioned in the Courts of the United States, nor in the judicial tribunals of the States

> of our nation, so far as we know, and we know that it has been repeatedly refused in the latter."

The opinion concludes that the general rule of comity which has been internationally accepted ought not to be adopted for this country, even as between our several states. The reason given is that to permit a receiver of one state to sue in another might be prejudicial to the interests of the local creditors of the state where the receiver would thus be permitted to sue. The decision has been frequently followed by this Court.

However, this court has not seen fit to extend the rule. On the contrary, it has indicated an intention to limit the effect of its decision.

In the case of *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163, 27 S. C. 755 (1906), a far-reaching exception was established,—and has since been often applied,—that a state statutory receiver such as may be characterized as a "quasi-assignee" of the corporation could as such sue beyond the jurisdiction of the receiver's appointment. This may be said to be inconsistent with the reason for the rule. The position of local creditors would be prejudiced to the same extent whether the assets were removed by a foreign receiver who may be characterized as a "quasi-assignee" or by a mere equity receiver.

In the case of *Converse* v. *Hamilton,* 224 U. S. 243, 56 L. Ed. 749, 32 S. C. 415 (1911), the Court applied the full faith and credit clause of the Constitution and compelled a state, against that state's views of its own public policy, to permit the foreign receiver to sue where such receiver may be characterized as a "quasi-assignee" of the corporation.

That the rule of *Booth* v. *Clark,* concerns only a question of *state* comity is demonstrated in more than one

way. In the case of *Grant* v. *Leach & Co.,* 280 U. S. 351, 74 L. Ed. 470, 50 S. C. 107 (1930), this Court permitted a federal equity receiver appointed in one district of Ohio to maintain a suit beyond the jurisdiction of that Court, namely in another district of Ohio, and this apparently for the simple reason that there was no question of state comity involved. The Court said:

> "We think that under these circumstances the Federal Court in the same state cannot rightly be considered a court of foreign jurisdiction within the meaning of the general rule, and that there is no substantial grounds for extending that rule, as hitherto applied, so as to bring this case within its terms" (p. 362).

Again this Court, in *Finney* v. *Guy,* 189 U. S. 335, 47 L. Ed. 839, 23 Sup. Ct. Rep. 558, said:

> "Whether, aside from the federal considerations just discussed, the Wisconsin court should have permitted this action to be maintained because of the principle of comity between the states, is a question exclusively for the courts of that state to decide" (p. 345).

This language was quoted with approval in the decision of *Converse* v. *Hamilton, supra.*

Moreover, the rule of *Booth* v. *Clark* is not followed by most of our states. In an overwhelming majority of the states in which the question has been judicially considered, the rule of *Booth* v. *Clark* has been rejected and a foreign receiver is allowed to sue on principles of comity.*

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*In the following states a foreign equity receiver is permitted to sue:

ALABAMA

Boulware v. *Davis,* 90 Ala. 207, 8 So. 84, 1889.

While generally the comparatively few states, which have adopted the federal view, also follow the broad exception engrafted upon it by the *Bernheimer* decision, it is clear that, if they did not, this Court would, under the *Hamilton* decision, compel them to do so.

CALIFORNIA
Wright v. *Phillips*, 60 Calif. Appeals 578, 213 Pac. 288, 1923;
Ward v. *Pacific Mutual Life Insurance Company*, 135 Calif. 235, 67 Pac. 124, 1901.

FLORIDA
Richardson v. *Southern Florida Mortgage Co.*, 102 Fla. 313, 1931.

INDIANA
Metzner v. *Bauer*, 98 Ind. 425, 1884.

KENTUCKY
Johnston v. *Rogers*, 19 Ky. L. R. 1272, 43 S. W. 234, 1897;
Hallam v. *Ashford*, 24 Ky. L. R. 870, 70 S. W. 197, 1902.

MICHIGAN
Pontiac Trust Company v. *Newell*, 266 Mich. 490; 254 N. W. 178, 1934;
Baldwin v. *Circuit Judge*, 101 Mich. 119, 1894.

MINNESOTA
Comstock v. *Frederickson*, 51 Minn. 350, 53 N. W. 713, 1892;
Stevens v. *Tilven*, 122 Minn. 250, 1913.

MISSOURI
Weil v. *Bank of Burr Oak*, 76 Mo. App. 34, 1898;
Robertson v. *Stead*, 135 Mo. 135, 1896.

NEW HAMPSHIRE
Tompkins v. *Blakey*, 70 N. H. 584, 1900.

NEW JERSEY
Hurd v. *City of Elizabeth*, 41 N. J. Law 1, 1879.

NEW YORK
Hoyt v. *Thompson*, 5 N. Y. 320, 1851;
Mabon v. *Ongley Electric Co.*, 156 N. Y. 196, 1898;
Union Guardian Trust Co. v. *Broadway National Bank*, 138 Misc. 16, 1930.

NORTH CAROLINA
Van Kempen v. *Latham*, 195 N. C. 389, 1928.

OHIO
Bank v. *McLeod*, 38 Ohio State, 174, 1882;
State v. *Crabbe*, 114 Ohio State, 504, 151 N. E. 755, 1926.

PENNSYLVANIA
Bagby v. *Atlantic, Mississippi & Ohio Railroad*, 86 Penn. State, 291, 1878.

SOUTH CAROLINA
Wilson v. *Keels*, 54 S. C. 545, 1898.

SOUTH DAKOTA
Small v. *Smith*, 14 S. D. 621, 86 N. W. 649, 1901;
Cole v. *Sassenberry*, 56 S. D. 595, 230 N. W. 22, 1930.

TENNESSEE
Hardee v. *Wilson*, 129 Tenn. 511, 1914.

In the face of such an overwhelming trend of judicial opinion, the Courts, we submit, should not by insisting upon hollow technical formality enlarge the sphere in which the rule of *Booth* v. *Clark* has practical

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VERMONT
Insurance Company v. *Wright*, 55 Vermont 526, 1883.

WEST VIRGINIA
Shull v. *Fidelity & Guaranty Company*, 81 West Va. 184, 1917;
Grogan v. *Egbert*, 44 West Va. 75, 1897.

WISCONSIN
Parker v. *Stoughton Mill Company*, 91 Wisc. 174, 1895.

WYOMING
Continental Oil Co. v. *American Co-op. Ass'n*, 31 Wyoming 433, 228 Pac. 503, 1924.

The law of England is in accord.

Alvon v. *Furnival*, 1 Cr. M. & R. 277, 149 English Reports 1085, 1834;
McAuley v. *Guaranty Trust Company of New York*, 1927 W. N. 308, 44 Times Reports 99.

In the following states there is no direct holding on the question, but the courts have indicated their approval of the majority view allowing a foreign equity receiver to sue:

ARKANSAS
Choctaw Coal Company v. *Williams-Echols Dry Goods Company*, 75 Ark. 365, 87 S. W. 632, 1905.

ILLINOIS
Sercomb v. *Catlin*, 128 Ill. 556, 1889;
Patterson v. *Lynde*, 112 Ill. 196, 1884.

KANSAS
Winans v. *Manufacturing Co.*, 48 Kansas 777, 30 Pac. 163, 1892.

MAINE
Hunt v. *Columbian Insurance Co.*, 55 Me. 290, 1867.

MARYLAND
Castleman v. *Templeman*, 87 Md. 546, 1898.

NEBRASKA
Ten Broeck v. *Caldwell*, 95 Nebr. 464, 145 N. W. 980, 1914.

OREGON
Eagan v. *North America Loan Company*, 45 Ore. 131, 76 Pac. 774, 1904.

The rule of *Booth* v. *Clark*, is clearly followed in only 3 states:

IOWA
Baird v. *Cole*, 207 Ia. 664, 1929;
Wyman v. *Eaton*, 107 Ia. 214, 1899.

MASSACHUSETTS
Homer v. *Barr Pumping Engine Co.*, 180 Mass. 163, 1901.

TEXAS
Moseby v. *Burrow*, 52 Texas 396, 1880;
Moreau v. *Du Bellet*, 27 S. W. 503, Court of Civil Appeals, Texas, 1895.

It appears that the other states in this country have not considered the question.

effect in a case where reason and justice would thus be defeated.

While the rule seems to have become fixed in the Federal Courts that, in their view, considerations of state comity should not permit a foreign equity receiver to sue even in a Federal Court situated, for example, in the state of New York, which, applying its own view of comity, permits such suit, it would seem that the procedure which was here adopted has given full and adequate recognition to and compliance with that rule.

The receiver in applying for and obtaining his appointment as ancillary receiver, thus submitted himself to the control and jurisdiction of the Federal District Court in the Southern District of New York and went under bond for the protection of the local creditors, if any, of that state; and this gave full recognition and protection to the interests of the possible local creditors, and much greater recognition than the courts of New York would have seen fit to require upon behalf of its own citizens in case recourse had been had to the Courts of the state rather than to the Federal Court located in New York.

At most the rule says that the protection of local creditors requires the denial of interstate comity to foreign receivers. But a bonded, ancillary receiver, appointed as was the petitioner, is subservient to the orders and directions of the local Federal Court which appointed him and clearly is as accountable to local creditors as though his appointment had been obtained in a separate suit.

There is no underlying difficulty arising from questions of jurisdiction or judicial power to act even in permitting a foreign receiver as such to sue. This is made clear both by the decisions of this court, as well as of the numerous state courts. As shown by the decision of this

court in *Grant* v. *Leach, supra,* it is proper in the Federal courts to permit an equity receiver to sue beyond the confines of the district of the appointing court so long as he does not cross a state border; and as shown above the majority of the states which have considered the matter permit a foreign equity receiver to cross the state border to sue.

As shown also by the decisions referred to at the beginning of the argument, the procedure here adopted in procuring the ancillary appointment violated no principle relating to jurisdiction or judicial power.

Nothing more is involved than what this court shall deem to be a suitable compliance with its own view of the regard which should be given to the states' comity. We submit that it should be fully sufficient for these purposes that the ancillary receiver, who is appointed for the purpose of the suit, be appointed by petition as was done in the instant case.

The decision goes farther than holding that the appointment of the ancillary receiver was irregular. The Court below held that the appointment was entirely void and could be collaterally attacked.

But it is established law that this appointment of the ancillary receiver may not be collaterally attacked.

In *Cadle* v. *Baker,* 87 U. S. 650, 22 L. Ed. 448, Waite, *Chief Justice,* said:

> "The debtors of a bank, when sued by a receiver, cannot inquire into the legality of his appointment. It is sufficient for the purposes of such a suit that he has been appointed and is receiver in fact."

The rule of this case has been applied to the receiver of an industrial corporation in *Grant* v. *Leach & Co.,*

280 U. S. 351, 74 L. Ed. 470 (1930). The Court said by Sanford, *J.*, at page 359:

> "It is questioned whether under this statute the court rightly appointed, under the petition of the mortgage trustee, a receiver of the portion of the furnace company's property which was not covered by the mortgage; * * *. But, however, this may be, the court had jurisdiction and the power to determine these questions. * * * And plainly the validity of the appointment could not have been questioned by a collateral attack in another court. See *Cadle* v. *Baker,* 20 Wall. 650, 651, 22 L. ed. 448, 449; *Shields* v. *Coleman,* 157 U. S. 168, 178, 39 L. ed. 660, 663, 15 Sup. Ct. Rep. 570; *Lively* v. *Picton,* 134 C. C. A. 189, 218 Fed. 401, 406; *Lydick* v. *Neville,* (C. C. 8th), 287 Fed. 479, 482; *Olmstead* v. *Distilling & Cattle Feeding Co.,* (C. C.), 73 Fed. 44, 48; *Shinney* v. *North American Sav. Loan & Bldg. Co.,* (C. C.), 97 Fed. 9, 10; *Barbour* v. *National Exch. Bank,* 45 O. S. 133, 140, 12 N. E. 5; *McNary* v. *Bush,* 35 Or. 114, 117, 56 Pac. 646."

The defendants in their brief and upon the argument below put great stress upon the decision of the Circuit Court of Appeals in the case of *Sterrett* v. *Second National Bank,* 246 Fed. 753 (C. C. A. 6th, 1917), which was affirmed by this Court. In this case the Court said at page 758:

> "A defense that plaintiff has no title to the asserted right of action is always open.
>
> "* * * But lack of title in plaintiff is not a mere 'technicality,' in the ordinary meaning of that term, for there is always, theoretically at least, a possibility that defendant may be subjected to further suit by the owner of the title and right of action. The present difficulty could

> readily have been avoided by ancillary receivership and the dismissal of the case will not necessarily preclude further proceedings. Whether an ancillary receivership, and an ancillary bill thereunder, would save the present suit from dismissal, we need not decide. See *Coal & Iron R. Co.* v. *Rehcrd,* (C. C. A. 4th C.), 123 C. C. A. 155, 204 Fed. 859, 882."

We have set out at page 9 above, the holding in the *Coal & Iron Ry. Co.* case, and the Circuit Court of Appeals by referring with approval to that case certainly indicated that, had the objection been merely one to the validity of the appointment of an ancillary receiver, it could not have been raised collaterally. The decision in the *Sterrett* case cannot therefore be taken as out of line with the rule laid down by this Court in *Cadle* v. *Baker, supra,* and recently applied by it in *Grant* v. *Leach, supra,* that the validity of the appointment of the ancillary receiver may not be collaterally attacked.

The Court should have in mind that in the *Sterrett* case, a foreign receiver as such had brought the suit, claiming that he as such receiver had *title* to the assets of the corporation and for that reason could sue under the exception to the doctrine of *Booth* v. *Clark,* established by the decision of *Bernheimer* v. *Converse.* The Court held that the foreign receiver could not maintain the action for the reason that he did not have *title,*—that he was not a quasi-assignee within the meaning of the *Bernheimer* decision.

But the complainant in the instant case has never attempted to sue in his capacity as a foreign receiver and *never has made the least claim of title.* His position is that, since for the reason that he did not have title and

under the doctrine of *Booth* v. *Clark,* could not maintain this suit, he therefore, in compliance with that doctrine, took proceedings to bring about his appointment as ancillary receiver. The only question presented is the sufficiency of the proceedings resulting in such appointment.

As we believe we have demonstrated above, there can be no question here of jurisdiction in any sense, or of the power of the United States District Court to make the order appointing the complainant ancillary receiver. We submit that the order of the United States District Court of the Southern District of New York, dated the 23rd day of March, 1932, which appointed the complainant as ancillary receiver is not subject to collateral attack in this suit by these defendants.

Finally, we submit that the appointment of the petitioner as ancillary receiver is valid and he has the right as such to maintain this suit and that the appointment cannot be collaterally attacked.

CONCLUSION

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED WITH COSTS HERE AND IN THE COURT BELOW.

New York, September, 1934.

Respectfully submitted,

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